

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FOUNDATION AGAINST INTOLERANCE
AND RACISM, INC.,

CASE NO. 24-cv-01770-JHC

ORDER RE: MOTION TO DISMISS

Plaintiff,

V.

STEVE WALKER, in his official capacity as Executive Director of the Washington State Housing Finance Commission,

Defendant.

I

INTRODUCTION

This matter comes before the Court on Defendant's motion to dismiss. Dkt. # 14.

Plaintiff, Foundation Against Intolerance and Racism, Inc. (FAIR), claims that the Covenant Homeownership Program—a special purpose credit program administered by the Washington State Housing Finance Commission and designed to reduce racial disparities in homeownership—violates the Equal Protection Clause of the Fourteenth Amendment. Dkt. # 1. Defendant Steve Walker, Executive Director of the Washington State Housing Finance Commission, says that Plaintiff lacks standing to pursue its claims, and he seeks dismissal under

1 Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. # 14. For the reasons discussed
 2 below, the Court GRANTS the motion.

3 **II**

4 **BACKGROUND**

5 A. Factual Background

6 This factual background is based on the allegations in the complaint, *see* Dkt. # 1, which
 7 the Court accepts as true on a Rule 12(b)(6) motion to dismiss.¹

8 Washington Governor Jay Inslee signed HB 1474, the Covenant Homeownership Act, in
 9 May 2023. Dkt. # 1 at 3–4. The Act commissioned a study to investigate racial disparities in
 10 homeownership in Washington state and to evaluate the feasibility of various programs intended
 11 to reduce such disparities. *Id.* at 4; *see* Dkt. # 15-5 at 1.² As a result of the Act, in July 2024, the
 12 Washington State Housing Finance Commission launched the Covenant Homeownership
 13 Program to provide “downpayment and closing cost assistance for first-time homebuyers in the
 14 form of a loan, secondary to the primary mortgage loan.” Dkt. # 1 at 4; Dkt. # 1-1 at 2.

15 An applicant must meet several eligibility requirements to take advantage of the
 16 Covenant Homeownership Program. Dkt. # 1 at 4. First, the applicant must have a household
 17 income at or below 120% of the area median income for the county where the home is located.
 18 *Id.*; *see* Dkt. # 23-1 (showing this requirement was amended from 100% to 120% after the
 19 complaint was filed). Second, the applicant must be a first-time homebuyer. Dkt. # 1 at 4. The
 20 Program defines a first-time homebuyer as someone who (1) “has not owned a home within the

21
 22 ¹ For purposes of Defendant’s factual challenge to Plaintiff’s standing under Rule 12(b)(1),
 23 however, Plaintiff’s allegations must be supported by “competent proof.” *See Bowen*, 118 F.4th at 1142.
 24 This requirement is discussed further in Section III.B.2, *infra*.

² The Court takes judicial notice of the Covenant Homeownership Program documents introduced
 by Defendant outside the complaint because they come from sources whose accuracy cannot reasonably
 be questioned. Fed. R. Evid. 201(b)(2); *see* Dkt. ## 15-1, 15-2, 15-3, 15-4.

1 past three years”; (2) “is a single parent and has only owned a home while married to a former
2 spouse”; (3) “is a displaced homemaker and has only owned a home with a spouse”; (4)
3 “previously only owned a manufactured home”; or (5) “previously owned property determined to
4 be uninhabitable.” *Id; see* Dkt. # 1-1 at 5. Third, the applicant or their parent, grandparent, or
5 great-grandparent must have lived in Washington state before April 1968. Dkt. # 1 at 4. Fourth,
6 the applicant or their parent, grandparent, or great-grandparent must be Black, Hispanic, Native
7 American/Alaskan Native, Native Hawaiian or other Pacific Islander, Korean, or Asian Indian.
8 *Id.* The applicant must provide documentation to prove they meet the residency and race
9 requirements, but no proof is required to show the applicant or their relatives personally
10 experienced racial discrimination when trying to buy a home. *Id.* at 5.

11 A FAIR member, identified as Member A, wishes to buy a home in Washington state but
12 says she is ineligible to apply for the Program solely because of her race. *Id.* at 7. She identifies
13 as “European-American” and maintains that she meets the Program’s household income, first-
14 time homebuyer, and residency requirements. *Id.* She says that if the Program had only race-
15 neutral requirements, she would be “ready, willing, and able to apply and be considered for a
16 loan under the Program.” *Id.*

17 B. Procedural History

18 Plaintiff claims that the Covenant Homeownership Program violates the Equal Protection
19 Clause of the Fourteenth Amendment because the Program discriminates on the basis of race.
20 *Id.* at 6. Plaintiff further claims the Program’s racial classification does not serve a compelling
21 state interest and Defendant has not specifically identified any racial discrimination to be
22 remedied by the Program. *Id.* Plaintiff adds that even if Defendant could demonstrate the
23 Program’s racial classification serves a compelling government interest, Defendant cannot prove
24 the Program’s race eligibility requirements are narrowly tailored to achieve that interest. *Id.*

1 Plaintiff seeks a judgment declaring the race eligibility preference in the Covenant
 2 Homeownership Program violates the Equal Protection Clause, a permanent injunction
 3 prohibiting Defendant from enforcing the challenged racial preference requirement, an order
 4 requiring Defendant to implement eligibility criteria that provide housing benefits without regard
 5 to the race of applicants, attorney's fees and costs, and \$1.00 in nominal damages. *Id.* at 7.

6 Defendant moves to dismiss the complaint under Federal Rules of Civil Procedure
 7 12(b)(1) and 12(b)(6). Dkt. # 14; *see* Fed. R. Civ. P. 12(b)(1), 12(b)(6). Defendant argues
 8 Plaintiff does not have Article III standing to bring a claim on behalf of its members because it
 9 does not show Member A has standing to sue on her own. Dkt. # 14 at 19–20. According to
 10 Defendant, Member A does not have standing because she does not provide the requisite proof to
 11 show she is, in fact, “ready, willing, and able” to meet the race-neutral criteria of the Covenant
 12 Homeownership Program. *Id.* at 22–25. Defendant further contends that Member A must be
 13 identified by name before Plaintiff can establish one of its members has standing. *Id.* at 25. And
 14 Defendant says that Plaintiff's claim for nominal damages is barred by the Eleventh Amendment.
 15 *Id.* at 29–30.

16 III

17 DISCUSSION

18 A. Motion to Dismiss Standards

19 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
 20 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
 21 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Upon
 22 such a motion, a court accepts all factual allegations in the complaint as true and construes them
 23 in the light most favorable to the nonmoving party. *Chubb Custom Ins. Co. v. Space Sys./Loral,*
 24 *Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). But a “court need not . . . accept as true allegations that

1 contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to
 2 accept as true allegations that are merely conclusory, unwarranted deductions of fact, or
 3 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).
 4 (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

5 B. Standing

6 Article III of the Constitution limits the jurisdiction of federal courts to “Cases” and
 7 “Controversies.” U.S. Const., Art. III, § 2. The doctrine of standing defines these Constitutional
 8 limits and “identif[ies] those disputes which are appropriately resolved through the judicial
 9 process.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). If a plaintiff
 10 has no standing to sue, the court lacks subject-matter jurisdiction and the complaint must be
 11 dismissed in its entirety. *Id.*; *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

12 1. Associational Standing

13 Organizations can assert standing in their own right or on behalf of their members. *E.*
 14 *Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 662 (9th Cir. 2021) (citations omitted).
 15 Plaintiff asserts standing on behalf of its members. Dkt. # 1 at 2. To show it meets the
 16 requirements of associational standing, FAIR must establish (1) “its members would otherwise
 17 have standing to sue in their own right”; (2) “the interests at stake are germane to the
 18 organization’s purpose”; and (3) “neither the claim asserted nor the relief requested requires the
 19 participation of individual members in the lawsuit.” *Friends of the Earth, Inc. v. Laidlaw Env’t*
 20 *Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citation omitted).

21 The parties’ dispute is based solely on the first of these requirements. Dkt. # 14 at 13.
 22 To satisfy this prong, Plaintiff must make “specific allegations establishing that at least
 23 one identified member had suffered or would suffer harm.” *Associated Gen. Contractors of Am.,*
 24 *San Diego Chapter, Inc. v. Cal. Dep’t of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013) (internal

1 citation and emphasis omitted). But this does not necessarily mean the member must be
 2 identified by name. Instead, “[w]here it is relatively clear, rather than merely speculative, that
 3 one or more members have been or will be adversely affected by a defendant’s action, and where
 4 the defendant need not know the identity of a particular member to understand and respond to an
 5 organization’s claim of injury, [the Ninth Circuit] see[s] no purpose to be served by requiring an
 6 organization to identify by name the member or members injured.” *Nat'l Council of La Raza v.*
 7 *Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015), *overruled on other grounds as recognized in*
 8 *Ariz. All. for Retired Ams. v. Mayes*, 117 F.4th 1165, 1176-77 (9th Cir. 2024).

9 Accepting the allegations in the complaint as true and construing them in the light most
 10 favorable to Plaintiff, the Court concludes “it is relatively clear, rather than merely speculative”
 11 that Defendant need not know the identity of Member A to understand and respond to the
 12 complaint. *Id.* The complaint says the Program’s race eligibility requirement harms Member A
 13 because it prevents her from applying for the Program’s benefits. Dkt. # 1 at 3. Knowing
 14 Member A’s identity is unnecessary for Defendant to understand and respond to these
 15 allegations. So, at the pleading stage, Member A need not be identified by name before Plaintiff
 16 can meet the first requirement of associational standing.³ Thus, if Member A has standing to sue
 17 in her own right then FAIR has associational standing to sue. But if Member A lacks standing to
 18 sue in her own right then FAIR’s complaint must be dismissed.

19 2. Individual Standing

20 To demonstrate individual standing, a plaintiff must show (1) she “has suffered an ‘injury
 21 in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or

22
 23 ³ But Plaintiff will not be allowed to rely solely on mere allegations to establish standing in the
 24 later stages of this case. *Lujan*, 504 U.S. at 561 (each element of standing “must be supported in the same
 way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree
 of evidence required at the successive stages of the litigation.”).

1 hypothetical”; (2) “the injury is fairly traceable to the challenged action of the defendant”; and
2 (3) “it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable
3 decision.” *Friends of the Earth*, 528 U.S. 167, 181 (2000) (citing *Lujan*, 504 U.S. at 560–61).

4 Defendant says Member A does not have Article III standing for two reasons. First, he
5 says she has not demonstrated that she qualifies for a primary mortgage; thus, she does not meet
6 a race-neutral precondition for the secondary mortgage benefits offered through the Covenant
7 Homeownership Program. Dkt. # 22 at 7. Defendant argues that Member A may never meet this
8 precondition, so her alleged injury is too speculative to demonstrate standing. *Id.* Second, he
9 says Member A provides only conclusory statements to support her contention that she meets the
10 Program’s income and residency requirements. *Id.* at 7. He says that once Defendant lodged a
11 factual attack on these allegations under Rule 12(b)(1), Member A needed to provide affidavits
12 or other evidence to support her claims. *Id.* at 17. Consequently, Defendant asserts that Member
13 A does not meet the standing requirements and Plaintiff’s claims must be dismissed.

14 Plaintiff responds that Member A shows an “injury in fact” because she cannot compete
15 equally with other applicants for homebuyer assistance from the Covenant Homeownership
16 Program because of the state’s race-based preferences. Dkt. # 19 at 12. It says that Member A
17 need not demonstrate that she would obtain a loan under the Program to show the state prevents
18 her from competing for that loan on an equal basis. *Id.* And Plaintiff says that Member A’s
19 prior efforts to obtain government homebuying assistance demonstrate her intention to apply for
20 the Program and use the benefits to buy a home. *Id.* at 17. Plaintiff says that this shows Member
21 A has standing to pursue her claims for declaratory and injunctive relief. *Id.* at 18.

22 The Supreme Court has explained that a plaintiff who seeks to challenge a government
23 program under the Equal Protection Clause must show she is “able and ready” to apply for the
24 program’s benefits, but an allegedly discriminatory policy prevents her from doing so on an

1 equal basis. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,*
 2 *Fla.*, 508 U.S. 656, 666 (1993). In that case, the contractor plaintiffs challenged a city ordinance
 3 that required about 10% of the spending on city contracts to be set aside each fiscal year for
 4 “Minority Business Enterprises” (MBEs). *Id.* at 658. The plaintiffs alleged that many of their
 5 members regularly bid on and performed construction work for the city of Jacksonville. *Id.* at
 6 659. These plaintiffs also alleged they would have bid on contracts set aside for MBEs but were
 7 prevented from doing so by the ordinance. *Id.* The Court reviewed its prior decisions and
 8 reaffirmed that a plaintiff challenging a barrier to government benefits does not need to allege
 9 she “would have obtained the benefit but for the barrier in order to establish standing.” *Id.* at
 10 666. The “injury-in-fact” in an equal protection case like this, the Court explained, is “the denial
 11 of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain
 12 the benefit.” *Id.* So, to establish standing, the plaintiffs needed to show they were “able and
 13 ready to bid on contracts and that a discriminatory policy prevent[ed them] from doing so on an
 14 equal basis.” *Id.* Because it was undisputed that plaintiffs’ regularly bid on construction
 15 contracts in Jacksonville and—if not for the ordinance—they would have bid on contracts set
 16 aside for MBEs, the Court concluded it was inappropriate for the Court of Appeals to dismiss
 17 plaintiffs’ complaint for lack of standing and the case was remanded for further proceedings. *Id.*
 18 at 668–69.

19 Member A does not satisfy this requirement because she does not demonstrate that she is
 20 “able and ready” to apply for the Covenant Homeownership Program’s benefits. Although
 21 Member A alleges that she meets the Program’s first-time homebuyer, household income, and
 22 residency criteria, she does not allege that she qualifies for one of the primary mortgage loans
 23 that can be used in conjunction with the Program. Dkt. # 1; *see* Dkt. ## 15-2; 20. To be clear,
 24 Member A does not need “to first take out a partial loan for a home she could not afford, and

1 then apply for the Covenant Homeownership Program, a program she is categorically ineligible
2 for.” Dkt. # 19 at 7. But she does need to show that she qualifies for the sort of primary
3 mortgage that can be used in combination with the Program to demonstrate she is “able and
4 ready” to apply for the Program’s benefits. *Ne. Fla. Chapter of Associated Gen. Contractors of*
5 *Am.*, 508 U.S. at 668–69. The failure to qualify for an appropriate primary mortgage is fatal to
6 Member A’s standing arguments because the Program’s downpayment and closing cost benefits
7 can be used only in conjunction with a primary mortgage. Dkt. # 1-1 at 2. So, even if the barrier
8 to government benefits that Plaintiff challenges was removed, Member A’s eligibility to apply
9 for the Program is currently conjecture. Put differently, Member A has not established that the
10 allegedly discriminatory policy is what is preventing her from applying for the Program’s
11 benefits. Thus, Member A’s alleged injury is too speculative and does not demonstrate Article
12 III standing.

13 Simply because Member A received a VA Home Loan Certificate of Eligibility and
14 sought out other forms of homebuying assistance does not show that she qualifies for a primary
15 mortgage that can be used with the Program. Dkt. # 20 at 2. For instance, even though she
16 received a VA Certificate of Eligibility, Member A must also meet credit, income, and
17 occupancy requirements from the VA and her lender before she receives financing for a VA-
18 backed home loan. *See* Dkt. # 22 at 10. Member A does not mention these requirements or
19 claim to meet them. *See* Dkts. ## 1, 20. The fact that Member A has availed herself of other
20 forms of homebuying assistance does not change the Court’s conclusion that Member A lacks
21 standing because she has not demonstrated she qualifies for a primary mortgage that can be used
22 in combination with the Program.

23 In addition, unlike the defendant in *Northeastern Florida Chapter of Associated General*
24 *Contractors of America*, Defendant here challenges Member A’s standing under Rule 12(b)(1)

1 by contesting the truth of her claim that she meets the Program’s race-neutral eligibility
2 requirements. 508 U.S. at 668–69; *see Bowen v. Energizer Holdings, Inc.*, 118 F.4th 1134, 1142
3 n.6 (9th Cir. 2024) (“A factual attack on jurisdiction ‘contests the truth of the plaintiff’s factual
4 allegations, usually by introducing evidence outside the pleadings.’”) (quoting *Leite v. Crane
5 Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014)). Defendant introduced evidence from the Washington
6 State Housing Finance Commission’s website that shows Member A does not meet all the
7 Program’s race-neutral eligibility requirements, and Defendant introduced this evidence to
8 challenge Member A’s standing. Dkt. ## 14 at 19–26; 15-1, 15-2, 15-3, 15-4. In response,
9 Plaintiff needed to support its standing arguments with “competent proof” under the same
10 evidentiary standard that governs in the context of summary judgment. *Leite*, 749 F.3d at 1121.
11 Plaintiff failed to do so. Instead, Plaintiff submitted the declaration of Monica Harris, its
12 Executive Director, that is “based on information and belief.” Dkt. # 20 at 1. Declarations
13 “based on information and belief” are entitled to no weight at summary judgment because the
14 declarant lacks personal knowledge. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1412 (9th Cir.
15 1995). Accordingly, the Harris Declaration is not “competent proof.” Plaintiff’s claims about
16 Member A’s standing in this declaration are unsupported by the appropriate proof and similarly
17 fail to alter the Court’s conclusion that Member A lacks standing to sue in her own right.

18 C. Nominal Damages

19 Unlike the other claims, Plaintiff’s claim for nominal damages is dismissed with
20 prejudice because amendment would not change the conclusion that this claim is barred by the
21 Eleventh Amendment. Dkt. # 1 at 7.

22 Plaintiff sues Defendant, Steve Walker, for injunctive relief in his official capacity and
23 suit is properly brought against Mr. Walker because he “would be responsible for implementing
24 any injunctive relief.” *Edmo v. Corizon, Inc.*, 935 F.3d 757, 799 (9th Cir. 2019) (quoting

1 *Pouncil v. Tilton*, 704 F.3d 568, 576 (9th Cir. 2012)); *see* Dkt. ## 1 at 3; 19 at 21. But this also
2 means, as a state officer being sued in his official capacity, he is immune “from liability in
3 damages, including nominal damages” in federal court under the Eleventh Amendment. *Platt v.*
4 *Moore*, 15 F.4th 895, 910 (9th Cir. 2021) (internal citation omitted); *see Aholelei v. Dep’t of Pub.*
5 *Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007) (“The Eleventh Amendment bars suits for money
6 damages in federal court against a state, its agencies, and state officials acting in their official
7 capacities.”).

8 D. Leave to Amend

9 Because Plaintiff has not demonstrated Member A has standing to sue in her own right,
10 FAIR cannot bring a claim on behalf of its members and the complaint must be dismissed.
11 *Friends of the Earth*, 528 U.S. at 181; *Arbaugh*, 546 U.S. at 514. But the Court grants Plaintiff
12 leave to amend its complaint because amendment could fix the pleading defects. *Eminence*
13 *Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (“Dismissal with prejudice and
14 without leave to amend is not appropriate unless it is clear on de novo review that the complaint
15 could not be saved by amendment.”); *see* Dkt. # 19 at 22 (asking for leave to amend if the
16 complaint is dismissed).

1 **IV**

2 **CONCLUSION**

3 For all these reasons, the Court GRANTS the motion and DISMISSES the claim for
4 nominal damages with prejudice and the remaining claims without prejudice. Dkt. # 14. The
5 Court GRANTS Plaintiff leave until July 8, 2025, to file an amended complaint.

6 Dated this 24th day of June, 2025.

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9 John H. Chun
United States District Judge
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